IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Case No. : C.R.No.1763 of 2005
Date of Decision : September 05, 2006.

Smt.Roshni Devi ..... Petitioner

Vs.

Moman Ram and others ..... Respondents

Coram : Hon'ble Mr.Justice P.S.Patwalia

* * *

Present : Mr.Ashok Verma, Advocate
for the petitioner.

Mr.Ram Avtar Sheoran, Advocate
for respondents no.1 and 2.

Mr.Suresh Monga, Senior DAG, Haryana
for respondents no.3 to 5.

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P.S.Patwalia, J. :

The present revision petition has been filed challenging the order dated 5.3.2005 passed by the learned Additional District Judge, Sirsa whereby an application under Order 39 Rules 1 and 2 filed by the petitioner,

plaintiff in the suit, was dismissed and order dated 23.11.2004 passed by the learned Additional Civil Judge (Senior Division), Sirsa ordering status quo till the decision of the suit, was set aside.

Briefly the facts are that Krishan Kumar and three others – sons of Moman Ram filed an application through Moman Ram before the Sub Divisional Canal Officer for restoration of an alleged water course in the chak of outlet RD 135800-L, Sheranwali Distributory at Village Mehna Khera, Tehsil Ellenabad, District Sirsa.

On investigation by Ziledar it was reported that area of the aforementioned persons could be properly irrigated by the water course `ABCD' which is running at the site. Hence the demand for restoration of the water course was rejected. On an appeal filed by Moman Ram, Divisional Canal Officer recorded that he was satisfied that the demolished water course was existing at site. He therefore ordered the restoration of the demolished water course for six months from the date of the restoration of the water course.

Smt.Roshni Devi, petitioner in this revision petition filed a suit for declaration that the order passed by the Divisional Canal Officer was against law, null and void and for setting aside the same. Therein she impleaded Moman Ram, Malkiat Singh along with the State of Haryana, the Divisional Canal Officer and Sub Divisional Canal Officer as defendants. Along with the suit she filed an application under Order 39 Rules 1 and 2 for the grant of an interim injunction restraining the defendants, respondents in this revision petition, from digging any water course through her land holding on the basis of the order of the Divisional Canal Officer. Before the the learned Additional Civil Judge (Senior Division), Sirsa it was the case

of the petitioner, plaintiff in the suit that a water course could exist only if it was sanctioned under the Act, by an agreement/consent of the parties or by prescription. The Divisional Canal Officer while deciding the appeal did not record any conclusion as to whether the water course was sanctioned or not or had earlier existed on the site by the consent of the parties or by prescription. Moreover it was argued that if the water course was allowed to come up during the pendency of the suit the entire claim of the petitioner would be frustrated as the same was to come up only for a period of six months during which time the suit may not be decided. The defendants however argued that the order passed by the Divisional Canal Officer was rightly passed in appeal. The plaintiff never filed any appeal or revision against the said order which thus became final between the parties. It was also argued that the civil court would not have jurisdiction in the matter.

After hearing learned counsel for the parties the learned trial court granted the application with the following observations :-

> *"After having heard ld. counsel on behalf of both the sides and perusing the record carefully, I am of the considered opinion that the civil court has jurisdiction where the orders can be shown to be passed without application of mind and are not justifiable on the fact of the record. The order of S.D.C.O. clearly holds that there was no water course where the application for restoration was moved. The D.C.O. at the time of deciding the appeal has failed to make any observation as to whether the water course under reference was a sanctioned one or not. He has only mentioned that as*

per the statement of Boga Singh son of Rai Singh who was found present in his fields, had stated that demolished water course was existing at the site, that does not fulfill the requirement of law since water course can necessarily come into existence by three modes as mentioned earlier and it has not been made clear by D.C.O. in his order dated 18.10.2004 as to what was the mode coming into existence the water course on the mid-line of sq.No.57 killa No.25, sq.No.58 killa No.5, which he has ordered to be restored. In these circumstances on the face of it, there is a prima facie case in favour of the plaintiff and balance of convenience, is also in favour of applicant-plaintiff and she shall suffer an irreparable loss and injury if the defendants are allowed to dig the water course through her land. On the other hand, defendants, as already observed by the S.D.C.O., have a source of irrigation from a running water course, ABCD, therefore, no loss would be suffered by the defendants. As such, the parties are directed to maintain status-quo regarding the water course in question till the final decision of the suit. The application accordingly stands disposed of."

The learned Additional District Judge however has set aside this order of the trial court. The learned Judge held that once prima facie the canal authorities had accepted the claim of the appellant then whether or not the order was illegal or perverse, was to be proved by leading evidence

before the trial court. Therefore there was no prima facie case in favour of the plaintiff. The relevant observations of the learned Additional District Judge are as hereunder :-

> *"....Thus, prima facie, Canal Authorities have accepted the claim of appellant as being true and valid. Respondent no.1 impugns abovesaid order dated 18.10.2004 of respondent no.4 on a number of grounds. Whether or not impugned order dated 18.10.2004 is really illegal and perverse is a matter to be proved by respondent no.1 by adducing evidence before ld. trial court. At this stage, there is nothing on record to prove that impugned order dated 18.10.2004 of respondent no.4 is illegal and invalid. That being so, respondent no.1 fails to show the existence of a prima facie case in his favour, at this stage."*

It was further noted that under Section 25 of the Haryana Canal and Drainage Act, the jurisdiction of the civil court was barred. On this basis the application under Order 39 Rules 1 and 2 was dismissed.

I have heard Mr.Ashok Verma, Advocate for the petitioner, Mr.Ram Avtar Sheoran, Advocate for respondents no.1 and 2 and Mr.Suresh Monga, Senior Deputy Advocate General, Haryana for respondents no.3 to 5.

Learned counsel for the petitioner has argued that order passed by the learned Divisional Canal Officer is totally cryptic and non speaking. He stated that a water course can exist if it was sanctioned under the Haryana Canal and Drainage Act, 1974 or it is in existence under an

agreement of the parties or by prescription. For this proposition he relies upon a judgment of this court in the case of *Gugan and another vs. Sultan Singh and another* reported as *1982 P.L.J. 224*. He states that the Divisional Canal Officer has not recorded any finding as to how the water course came into existence. According to the learned counsel once the Sub Divisional Canal Officer had clearly held that no such water course existed at site it was incumbent upon the Divisional Canal Officer to record finding as herein above mentioned.

He further submits that in any case if the interim injunction is vacated and the canal authorities restore the water course at site, the petitioner would suffer an irreparable loss. Moreover since the order restored the water course only for six months the suit itself would be rendered infructuous.

Learned counsel for the respondents on the other hand defended the order of learned Additional District Judge and prayed for the dismissal of the revision petition.

After hearing learned counsel for the parties, I am of the opinion that in the facts and circumstances of this case status quo should be maintained during the pendency of the proceedings before the trial court. I am of the opinion that once the order of status quo is vacated and the water course is restored, the petitioner, plaintiff in the suit, would suffer irreparable loss. On the other hand it has been found by the Sub Divisional Canal Officer that the respondents have an alternative source of irrigating their fields. Therefore balance of convenience is also in favour of the petitioner as the defendants have an alternative source to irrigate their fields. Still further once the Sub Divisional Canal Officer has found that there did

not exist a water course at site prima facie case is also made out.

In the light of observations made above, this revision petition is allowed. The order of the learned Additional District Judge, Sirsa dismissing the application filed under Order 39 Rules 1 and 2 of the Code of Civil Procedure is set aside. Parties are directed to maintain status quo at site during the pendency of proceedings before the trial court.

September 05, 2006 (P.S.Patwalia)
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